



May 3, 2002

Ms. Peggy D. Rudd  
Director and Library  
Texas State Library and Archives Commission  
P.O. Box 12927  
Austin, Texas 78711-2927

OR2002-2313

Dear Ms. Rudd:

The Texas State Library and Archives Commission ("TSLAC") requests a decision concerning whether certain records of former Governor George W. Bush must be released to the public under chapter 552 of the Government Code. Your request was assigned ID# 162069.

Pursuant to section 441.201 of the Government Code, Governor George W. Bush designated the George Bush Presidential Library as the repository for his gubernatorial records in December 2000.<sup>1</sup> Since the former Governor designated the George Bush Presidential Library as the repository for his records, disputes have arisen concerning the ownership of the records, the role of TSLAC in the designation process, and the applicability of the Public Information Act (the "Act") to the records. Consequently, the Governor's Office and TSLAC have requested an Attorney General's Opinion under section 402.042 of the Government Code to help resolve these disputes.

During the pendency of the opinions process, the NARA, TSLAC, a representative of President George W. Bush, and the Governor's Office entered into an Interim Memorandum of Understanding ("IMOU") under which the NARA agreed to continue to maintain former Governor Bush's records and forward to TSLAC any request for the records within 72 hours of the NARA's receipt of the request. The terms of the agreement specify that TSLAC was given legal title to former Governor Bush's records as well as the authority and responsibilities afforded it under Texas law. Specifically, TSLAC agreed to review any requested records for information that could be excepted from disclosure under the Act and

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<sup>1</sup>The George Bush Presidential Library is a part of the National Archives and Records Administration, a federal agency, and is not a "governmental body" for the purpose of the Public Information Act. See Gov't Code § 552.003. We will collectively refer to the George Bush Presidential Library and the National Archives and Records Administration as the NARA.

request a decision from this office if and when the public availability of the information came into question. The IMOU may be terminated under its terms by any of the parties thereto upon the issuance of a formal Attorney General Opinion.

Prior to the effective term of the IMOU, the NARA received a request for records of former Governor Bush. This request, dated July 24, 2001, seeks information relating to 60 individuals. The request states that the 60 individuals were executed by the State of Texas between January 17, 1995 and February 9, 1998. The NARA did not immediately respond to the July 24, 2001, request. However, during the effective term of the IMOU, the NARA asked the requestor to resubmit the July 24, 2001 request "in priority ranking." The requestor submitted a request for information relating to 10 individuals, which the NARA received on February 6, 2002. The NARA submitted the February 6 request to TSLAC on February 8, 2002.

TSLAC believes that the information to which the requestor seeks access may be excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, and 552.134 of the Government Code. TSLAC also raises an issue under the Act regarding the timeliness of its request for this decision. We have considered TSLAC's arguments and have reviewed the responsive information that TSLAC has submitted.<sup>2</sup>

Initially, we address TSLAC's obligations under the Act with regard to the July 24, 2001 and February 6, 2002 requests. We begin by considering whether the July 24, 2001 request for information was sufficient to trigger the requirements of the Act as they apply to TSLAC. The July 24, 2001 request for information was submitted to the NARA, not to TSLAC. Moreover, that request preceded the effective term of the IMOU. Thus, on the date of the submission of that request to the NARA, the NARA was merely a repository for the requested information; the NARA was not an agent of TSLAC for purposes of receiving requests for information under the Act. *See* Gov't Code § 441.201; Open Records Decision No. 617 at 2-3 (1993). Therefore, because the July 24, 2001 request was submitted neither to TSLAC nor to a person with authority to receive a request for information on behalf of TSLAC under the Act, the Act does not require TSLAC to release information in response to that request. *See* Gov't Code §§ 552.221 (governmental body's officer for public information shall promptly produce information), .301(a) (governmental body's receipt of request for information that it wishes to withhold triggers obligation to request attorney general decision); Open Records Decision Nos. 497 at 3 (1988) (Act contemplates authorization of persons within governmental body to receive requests for information), 44

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<sup>2</sup> TSLAC states that it has received some of the responsive records from the NARA. TSLAC does not state, however, whether the NARA has completed its search for responsive records. Therefore, we understand that the submitted records are merely a representative sample of the requested records as a whole. This letter ruling assumes that the submitted "representative sample" of records is truly representative of the requested records as a whole. This ruling neither reaches nor authorizes TSLAC to withhold any responsive records that are substantially different from the submitted records. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

at 2 (1974) (request for information must be directed to person with authority to receive it); *but see* Open Records Decision No. 576 at 4 (governmental body may designate agent for receipt of request for information).

On February 6, 2002, however, and during the effective term of the IMOU, the requestor submitted the request for information relating to 10 individuals to the NARA. We now address the effect of the IMOU on TSLAC's responsibilities under the Act with respect to the February 6 submission. Section 552.301 of the Government Code prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301 provides in part:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the exceptions [to disclosure] under Subchapter C must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply . . . not later than the tenth business day after the date of receiving the written request [for information].

Gov't Code § 552.301(a)-(b). Section 552.302 states that "[i]f a governmental body does not request an attorney general decision as provided by Section 552.301 . . . the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information."

TSLAC received the February 6, 2002 request from the NARA on February 8, 2002. TSLAC informs us, however, that the NARA did not begin providing the requested information to TSLAC until February 21, 2002. TSLAC contends that its ten-business-day deadline under section 552.301(b) should not begin to run until the requested records at issue are available to TSLAC. However, TSLAC cites no authority that supports this contention, nor are we aware of any such authority. Rather, section 552.301(b) clearly states that the ten-business-day deadline for requesting a decision from this office under the Act runs from the day that the governmental body receives the request for information.

You also contend that "[t]his situation is somewhat analogous to that discussed in ORD-617." In Open Records Decision No. 617, this office discussed open records procedures applicable to the Records Management Division (the "RMD") of TSLAC. There, a request was made to TSLAC for microfilm copies of certain records produced by the Texas State Board of Veterinary Medical Examiners ("TSBVME"). Open Records Decision No. 617 at 2 (1993). TSBVME had transferred the source records to the RMD for microfilming before the records were destroyed. *Id.* at 1-2. The RMD then provided TSBVME with microfiche copies of the microfilm duplicates and kept the master microfilm

copies. *Id.* at 2. This office found that the RMD served as a mere warehousing facility for TSBVME, which still had legal custody of the documents, and the RMD was not in a position to respond to public information requests for the information it warehoused. *Id.* at 3. Although the NARA is serving, in part, as a warehousing facility under the terms of the IMOU, the NARA's role extends beyond the mere warehousing function of the RMD in Open Records Decision No. 617.

In Open Records Decision No. 576, this office determined that an entity performing document maintenance services for a governmental body can become that governmental body's agent for purposes of receiving a public information request under certain circumstances. Open Records Decision No. 576 at 3-4 (1990). There, the legislature had recently shifted the duty of administering and enforcing the Bingo Enabling Act from the Comptroller of Public Accounts (the "comptroller") to the Texas Alcoholic Beverage Commission ("TABC"). *Id.* at 1. The comptroller and TABC entered into an interagency agreement under which the comptroller agreed to continue to maintain certain computer and microfilm records created prior to the transfer of bingo regulation to TABC. *Id.* The comptroller further agreed to notify TABC promptly upon its receipt of an open records request for the information it maintained. *Id.* On the other hand, TABC agreed to be responsible for replying to any public information requests. *Id.* Based on the agreement between the two parties, this office found that the comptroller was the agent of TABC for the purpose of receiving open records requests. *Id.* at 4. However, "[r]esponsibility for responding to the open records request remain[ed] with [TABC]." *Id.* We further found that, for the purposes of the Act, an open records request was considered received by TABC when it was received by the comptroller. *Id.* at 4-5.

We find that the facts in Open Records Decision No. 576 are analogous to the present situation. Under the IMOU, the NARA and TSLAC agreed that the NARA and TSLAC would continue to maintain former Governor Bush's records and to forward any request for those records to TSLAC within 72 hours of the NARA's receipt of the request. Based on the agreement between the NARA and TSLAC, we find that the NARA was the agent of TSLAC for the purpose of receiving requests for former Governor Bush's records during the effective term of the IMOU. *See* Open Records Decision No. 576 at 4 (1990). Thus, during the effective term of the IMOU, TSLAC's ten-business-day deadline to request a decision under the Act was triggered by the date on which the NARA received the request for information. *See id.* at 4-5. Accordingly, the NARA's receipt of the February 6, 2002 request triggered TSLAC's deadline under section 552.301(b).

The tenth business day after February 6, 2002 was February 21.<sup>3</sup> TSLAC's request for this decision is dated February 22, 2002. TSLAC submitted its request for this decision by interagency mail. TSLAC has not provided evidence sufficient to establish that its request for this decision was timely submitted. *See* Gov't Code § 552.308(b). Thus, we conclude

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<sup>3</sup> For the purpose of this ruling, we assume that TSLAC, a state agency, was closed for the President's Day Holiday.

that TSLAC has not complied with section 552.301(b) in requesting a decision with respect to the February 6, 2002 request for information. Therefore, the information that is responsive to that request is presumed to be public and must be released, unless there is a compelling reason to withhold any of the information from public disclosure. Gov't Code § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ).

The presumption that information is public under section 552.302 can generally be overcome by a demonstration that the information is confidential by law or that third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Sections 552.103, 552.107, 552.108, and 552.111 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived; these exceptions do not make information confidential or protect third-party interests.<sup>4</sup> TSLAC waived sections 552.103, 552.107, 552.108, and 552.111 in failing to comply with section 552.301. *See generally* Open Records Decision No. 630 at 2-3 (1994). Therefore, TSLAC may not withhold any of the requested information under any of these exceptions. However, TSLAC also raises sections 552.101 and 552.134. As these exceptions can provide a compelling reason for non-disclosure under section 552.302 of the Government Code, we will address TSLAC's arguments under sections 552.101 and 552.134.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that is made confidential under other statutes. TSLAC raises section 552.101 in conjunction with section 508.313 of the Government Code. Chapter 508 of the Government Code is applicable to the Texas Department of Criminal Justice ("TDCJ"). Section 508.313 provides in part:

(a) All information obtained and maintained, including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

- (1) an inmate of the institutional division [of TDCJ] subject to release on parole, release to mandatory supervision, or executive clemency;
- (2) a releasee; or
- (3) a person directly identified in any proposed plan of release for an inmate.

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<sup>4</sup> *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (waiver of discretionary exceptions generally), 630 at 4 (1994) (section 552.107(1) may be waived), 542 at 4 (1990) (section 552.103 may be waived), 470 at 7 (1987) (section 552.111 may be waived), 177 at 3 (1977) (section 552.108 may be waived).

...

(c) [TDCJ] may provide information that is confidential and privileged under Subsection (a) to:

(1) the governor;

...

(d) In this section, "eligible entity" means:

(1) a government agency, including the office of a prosecuting attorney;

(2) an organization with which [TDCJ] contracts or an organization to which [TDCJ] provides a grant; or

(3) an organization to which inmates are referred for services by [TDCJ].

Gov't Code § 508.313. TSLAC asserts that some of the requested information is confidential under section 508.313.

In this instance, TDCJ transferred the information in question to the Governor in connection with clemency matters. Section 508.313 authorizes TDCJ to transfer information to the Governor for that purpose without affecting the confidentiality of the information. *See* Gov't Code § 508.313(c)-(d). Thus, the information that TDCJ transferred to the Governor for clemency purposes remained confidential under section 508.313. Under section 441.193 of the Government Code, TSLAC must preserve the confidentiality under the Act or any other state law of any archival state record that is transferred to TSLAC until state law allows access to that record. *See* Gov't Code § 441.193(f). Therefore, we conclude that the information that TDCJ transferred to the Governor is confidential under section 508.313 of the Government Code. We have marked that information accordingly. TSLAC must withhold that information under section 552.101 of the Government Code as information made confidential by law.<sup>5</sup>

TSLAC also asserts that some of the requested information is protected by a right to privacy. Section 552.101 of the Government Code also encompasses the common-law right to privacy. Common-law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind.*

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<sup>5</sup> As we are able to make this determination under section 508.313, we need not address section 552.134 of the Government Code.

*Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy encompasses the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. See 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information also are private under section 552.101. See generally Open Records Decision No. 659 at 4-5 (1999); see also Open Records Decision Nos. 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). We also note, however, that a deceased individual has no right to privacy. See Open Records Decision No. 272 at 1 (1981) (privacy is personal right that lapses at death). We have marked the requested information that is protected by common-law privacy. TSLAC also must withhold that information under section 552.101 of the Government Code. See Gov't Code § 441.193(f).

In summary, TSLAC need not release any information in response to the July 24, 2001 request for information. However, TSLAC must release the information that is responsive to the February 6, 2002 request, with the exception of information that is made confidential by law or that involves privacy interests. The information that is confidential under section 508.313 of the Government Code must be withheld from disclosure under section 552.101 of the Government Code. The information that is protected by common-law privacy also must be withheld under section 552.101. TSLAC must release the rest of the information that is responsive to the February 6, 2002 request.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling,

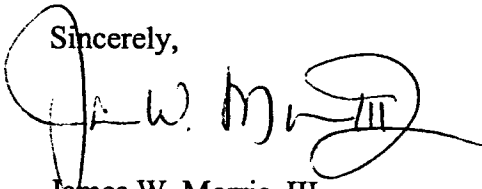
the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is stylized with a large, looping initial "J" and a long, sweeping underline.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 162609

Enc: Marked documents

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(w/o enclosures)